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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF ALASKA,

v. *Petitioner,*

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. A common tactic employed by respondents at the certiorari stage is to attempt to minimize the significance of the decision below, in the hope of avoiding plenary review by this Court. Respondents here have taken this ploy to extremes, arguing that the Ninth Circuit decision is “specific to Venetie” and “is unremarkable with unremarkable consequences.” Opp. 10, 14. This Court should not be misled. In seeking to secure the Ninth Circuit’s far-reaching Indian country ruling, respondents have attempted to dress a “wolf in sheep’s clothing.” *Williams v. Illinois*, 399 U.S. 235, 259 (1970) (Harlan, J., concurring) (internal quotation marks omitted).

Indeed, when not attempting to avoid plenary review in this Court, respondents' own counsel, the Native American Rights Fund ("NARF"), has proclaimed the Ninth Circuit ruling as a "landmark court decision," explaining that it

represents a *complete and unqualified* victory for tribes in Alaska. It eliminates the argument that ANCSA extinguished the territorial power of the tribes and, therefore, *will apply to virtually all other Native villages*. Specifically, the additional powers that the Tribe will have as a consequence of Indian Country status include the authority to: • tax, zone, condemn real property, • regulate land use, • manage fish and game (although the extent of such authority is unclear), • exercise civil and criminal misdemeanor jurisdiction over tribal members, and under certain circumstances exercise civil jurisdiction over non-tribal members, as well. [NARF, *Indian Country in Alaska: The Venetie Decision*, in *Justice*, at 1 (Spring 1997) (emphasis added).]

Respondents' counsel is by no means alone in its assessment of the broad significance of this case. In the Ninth Circuit, "over 180 Native Alaskan Communities" participated in an amicus capacity because, as they put it, they "have a vital interest in the issues presented in this appeal." Pet. App. 136a (quoting brief). The Ninth Circuit itself recognized "the high profile of this particular action" and that, "in light of the large number of similar Native Alaskan communities in Alaska, this is a very important case raising far-reaching issues." *Id.* 136a, 140a. Judge Fernandez emphasized that, in the wake of the decision below, "hundreds of tribes" will make "assertions of sovereignty over vast areas of Alaska," warning that this prognosis "is no imaginative parade of horribles." *Id.* 35a-36a. And, in this Court, 20 of the lower 48 States, as well as the Council of State Governments-West, have filed amicus briefs urging the Court

to review this case because of its importance, not only to Alaska but to the Nation as a whole.

2a. Respondents ground their efforts to mask the importance of the Ninth Circuit ruling in their assertion that it is "specific to Venetie." Opp. 10. There is nothing Venetie-specific, however, about the threshold Ninth Circuit rulings that (1) ANCSA does not preclude judicial designation of ANCSA lands as Indian country, Pet. App. 26a, or (2) that, in determining whether ANCSA lands may be designated as Indian country, courts should apply an *ad hoc*, six-part balancing test incorporating the Ninth Circuit's expansive federal superintendence standard, *id.* 13a. Those are the legal rulings the State challenges here. See Pet. i, 18-29. A plain reading of the Ninth Circuit opinion confirms that they are not limited to Venetie. See Pet. App. 6a-26a.

Nor can these rulings be dismissed as mere "statements in opinions." Opp. 12 n.12 (internal quotation marks omitted). As the analytical structure of the Ninth Circuit decision establishes, they are necessary predicates to the court of appeals *judgment*. See Pet. App. 6a, 13a, 26a, 32a. Indeed, the Ninth Circuit itself recognized that the conflicting results reached by it and the district court were the product of their "disagree[ment]" over whether ANCSA precludes judicial designation of land conveyed under that Act as Indian country, *id.* 30a—the first question presented by the petition. Pet. i. Judge Fernandez's separate opinion further underscores the threshold nature of this ruling. See Pet. App. 36a.

b. While it has no bearing on the threshold legal rulings challenged, respondents attempt to limit the reach of the Ninth Circuit decision by focusing on Venetie's *former* reservation status, disingenuously suggesting that the reservation—or the legal consequences of reservation status—persists today. Thus, they assert that Venetie "acquire[d] title to [an] existing reservation," Opp. i,

repeatedly refer to Venetie's former reservation status (often deleting the critical modifier "former"), *id.* 2-3, 5, 11, and assert that the Village simply "opt[ed] out of ANCSA" altogether, *id.* 5. ANCSA itself, however, proves respondents dead wrong.

ANCSA explicitly revoked all reserves in Alaska—including the former Venetie reserve—save one (Annette Island). 43 U.S.C. § 1618(a).¹ Respondents' only answer is to characterize this revocation as a "technical[ity]." Opp. 11 n.8. But such express congressional diminishment of a reservation is an act of great moment under this Court's own precedents. *See Hagen v. Utah*, 510 U.S. 399, 401 (1994) ("If the reservation has been diminished, then [the land] within the historical boundaries of the reservation, is not in 'Indian country.'"). This is not news to Venetie. After the Village acquired title to the 1.8 million-acre Venetie tract from the ANCSA corporations that held it, the federal government refused the Village's request to hold the land in trust, explaining that to do so would contravene "the clear expression of congressional intent in ANCSA not to create trusteeship or a reservation system." DOI Op., p. 112 n.276 (citing 1978 DOI memorandum and opinion letter). *See also* 43 U.S.C. § 1601(b) (ANCSA was intended to resolve Native claims "without creating a reservation system").

Moreover, respondents did not "opt out of ANCSA." Opp. 5. They simply chose a different benefits option established by the Act (§ 1618(a))—a one-time acquisition of land in fee simple, rather than benefits from the regional corporation established pursuant to ANCSA under state law. The land now owned by the Village initially was conveyed pursuant to ANCSA in fee to ANCSA corporations subject to *state* law. Pet. App.

¹ Venetie proposed an amendment to ANCSA that would have allowed the reservation to continue, but that amendment was rejected by Congress. *See Pet. App.* 116a.

116a-117a. The land was not conveyed to the Village until *eight* years after ANCSA was passed. *Id.* 4a, 117a. This transfer was not by any stretch of the imagination a federal set aside, but instead the "voluntary act" of state-chartered ANCSA corporations, "not joined in nor approved by the federal government." *Id.* 75a.

Accordingly, as respondents' own counsel has explained, the Ninth Circuit "holding is *not* unique to Venetie and, therefore, will apply to virtually *all* other Native villages." NARF, *Yes, There is Indian Country in Alaska*, 22 NARF Legal Rev. 1, 2 (Winter/Spring 1997) (emphasis added).²

3. Respondents also attempt to minimize the consequences of the court of appeals ruling. Thus, they claim that "the State's identified concerns are ephemeral" and that the Ninth Circuit decision has no impact on "the extent of *state* jurisdiction * * * over any matter whatsoever." Opp. 12-13 (emphasis in opposition). This is ridiculous. Whatever the precise scope of state jurisdiction over Indian country, it is indisputably limited—indeed, "quite limited." *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 & n.2 (1975). Thus, no matter how this limitation manifests itself in Alaska, the Ninth Circuit decision unquestionably restricts state sovereignty. *See Pet.* 11-12.

Respondents are quite wrong in suggesting that the Ninth Circuit ruling will not have dramatic practical consequences for Alaska. Indeed, in the wake of the Ninth Circuit decision, their own counsel has published a laun-

² Because the decision below is not limited to Venetie, it is not surprising that in *Alyeska Pipeline Service Co. v. Kluti Kaah Native Village of Copper Center*, 101 F.3d 610 (9th Cir. 1996), a case involving the assertion of Indian country status over ANCSA land that was *not* a former reservation, the Ninth Circuit looked to its decision in this case for "the appropriate standard for determining whether a dependent Indian community exists." *Id.* at 613.

dry list of the “additional powers” tribes will have as a consequence of Indian country status, *Indian Country in Alaska*, quoted *supra* at 2, notably including the authority to “manage fish and game,” *id.* See Pet. 14-15.³ Respondents claim that the threat of tribal taxation “makes no sense,” Opp. 14 n.5, but this case itself confirms that the threat is *real*, not “ephemeral,” *id.* 13. So does the *Kluti Kaah* case, in which a Native village attempted to tax economically vital oil and gas activities. See Pet. 16 n.11. The Ninth Circuit itself, moreover, recognized that a decision in favor of the Village here “would add fuel to the engines of Native Alaskan taxation.” Pet. App. 136a.

4a. Respondents are no more forthright when it comes to dealing with the multi-faceted conflict presented. The Ninth Circuit is now in direct conflict with the First Circuit over what respondents themselves concede is a “main element[]” (Opp. 19) of the dependent Indian community test—this Court’s federal superintendence requirement. Compare *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996) (adopting verbatim and quoting superintendence standard applied by Alaska District Court below) with Pet. App. 20a (rejecting same standard in favor of more expansive inquiry). This conflict is real: the Ninth Circuit itself recognized that the difference in legal standards was outcome determinative on the undisputed facts of this case. See *id.* 26a & n.5, 28a-29a; Pet. 26-27.

³ It is true that fish and game management in Alaska is presently “divided along jurisdictional lines” depending on whether land is federal or state/private. Opp. 13. This scheme itself, however, has been the source of litigation. The Ninth Circuit ruling stands to engraft upon it over 200 sovereign Indian enclaves, creating a “crazy quilt” (Pet. App. 36a) of federal, state, and tribal regulation, and thereby crippling any effective statewide fish and game management effort.

Respondents now attempt to distinguish *Narragansett*,⁴ but their counsel offered a more candid assessment of that case, from their perspective, in the Ninth Circuit, arguing there that “[Narragansett’s] view [of] ‘superintendence’ was certainly in error,” and “is simply not the law.” Reply to Amicus Curiae Br. of Shee Atika, Inc., pp. 11-12, filed in *Kluti Kaah*. Respondents’ own counsel, therefore, has acknowledged the direct conflict between the First Circuit position and the one respondents successfully advanced in the Ninth Circuit below. See also Opp. 9 & n.7 (emphasizing that Ninth Circuit rejected same standard applied in *Narragansett*).⁵

b. Respondents next assert that there is no “meaningful” conflict between the Alaska Supreme Court and the Ninth Circuit. Opp. 20, 21. The Alaska Supreme Court, however, does “not now and never has * * * recognize[d] * * * Indian country” in Alaska, *Native Village of Stevens*

⁴ Respondents argue that *Narragansett* is distinguishable because it did not involve “settlement lands.” Opp. 17 n.17. But the key distinction drawn by the First Circuit in *Narragansett* was that the land in question—like Venetie—was not “placed in trust with the United States,” 89 F.3d at 920, as the land subject to the Narragansett Land Claims Settlement Act—unlike the land subject to ANCSA—had been, *see id.* at 913, and, instead, was—like Venetie—held privately by the tribe in fee. Moreover, any suggestion that *Narragansett* is inapposite is refuted by the First Circuit’s express reliance on the district court decision in this case. *Id.* at 920, 921.

⁵ Since the petition was filed, the circuit conflict has only deepened. In *United States v. Adair*, 111 F.3d 770 (10th Cir. 1997), the Tenth Circuit held that an area of Oklahoma, which had been part of a 16 million-acre federal set aside to the Cherokee Indians but over time had been conveyed to Indians “restriction-free,” was not a dependent Indian community. *Id.* at 773. In so holding, the Tenth Circuit emphasized that mere receipt of federal benefits or assistance is insufficient to establish the requisite degree of dependency, *id.* at 776-777, a conclusion with which the Ninth Circuit (Pet. App. 28a-29a) and respondents (Opp. 9 & n.7) disagree. See also *Penobscot Indian Nation v. Key Bank of Maine*, 1997 WL 212524, at *26 n.12 (1st Cir. May 5, 1997) (existing authorities “indicate that ‘Indian Country’ * * * encompass[es] Indian trust lands but not Indian fee lands”).

v. *Alaska Management & Planning*, 757 P.2d 32, 35 (Alaska 1988); the Ninth Circuit in one fell swoop has made 44 million acres of Alaska newly eligible for Indian country status, overturning the established jurisdictional regime in Alaska. Pet. 20-21. Given the jurisdictional significance of Indian country status, that conflict is plainly "meaningful."

c. Perhaps respondents' most audacious assertion is that the decision below "does not conflict with longstanding interpretations of the Department of the Interior." Opp. 21. The Ninth Circuit held that ANCSA "did not extinguish Indian country in Alaska." Pet. App. 2a. The Department of the Interior—in an exhaustive, 133-page opinion directed to the precise question—has ruled that "[t]he statutory regime established in ANCSA precludes the treatment of lands received under that Act as Indian country." DOI Op., p. 131. The conflict could hardly be more clear. And, as discussed in the petition (p. 23), the Ninth Circuit's blatant disregard for the Secretary's opinion underscores the need for this Court's review. See *Aleknagik Natives Ltd. v. United States*, 806 F.2d 924, 926 (9th Cir. 1986) (Kennedy, J.) (Secretary of Interior's interpretation of ANCSA entitled to "considerable deference").⁶

5. Respondents briefly seek to avoid plenary review under the guise of finality. Opp. 15-16.⁷ The decision below, however, finally resolves jurisdictional issues of enormous and widespread importance, bringing the State to a cross-roads. The narrow issue left for remand—a determination of the particular tax obligation that may

⁶ While respondents argue that the 1993 DOI opinion has been under "reconsideration" (Opp. 22) for four years (and counting), the Department has taken pains to make clear that the opinion "has not been withdrawn or modified." 60 Fed. Reg. 9250, 9251 n.1 (Feb. 16, 1995) (emphasis added). Accord 59 Fed. Reg. 9280, 9284 n.1 (Feb. 25, 1994); 58 Fed. Reg. 54364, 54366 n.1 (Oct. 21, 1993). Thus, the conflict is not going away.

⁷ This Court of course has jurisdiction to review judgments of federal courts of appeals, whether interlocutory or final. 28 U.S.C. § 1254(1).

be assessed against the State, Pet. App. 32a—will in no way affect the threshold legal rulings challenged. Regardless of the outcome on remand, the challenged rulings will remain circuit law, inviting "each and every tribe * * * to test the limits of its power over what it deems to be its Indian country." *Id.* 36a. All agree, moreover, that there is no need to reach the narrow remedial issue left for remand if Venetie does not occupy Indian country.⁸ Thus, at the outset the district court preliminarily enjoined the Village's effort to collect the tax until the Indian country determination had been made, *id.* 140a, 141a, and the Ninth Circuit not only affirmed that injunction but stayed its Indian country ruling so that certiorari could be sought in this Court on the threshold questions presented. *Id.* 127a-140a, 142a.

This case therefore fits squarely into the category of interlocutory judgments the Court has seen fit to review on certiorari. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* 196 (7th ed. 1993) ("where * * * there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status") (citing cases). In the past Term alone, this Court has granted certiorari in numerous cases despite the interlocutory nature of the court of appeals judgment subject to review.⁹

Before Alaska is subjected to the vagaries of the Ninth Circuit Indian country regime, the State urges this Court

⁸ As the Ninth Circuit put it, "[t]he ultimate question presented by this case—whether Venetie has the authority to tax activities occurring within its territory—turns on whether [it] occupies Indian country." Pet. App. 6a.

⁹ See, e.g., *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 117 S. Ct. 1513 (1997); *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535 (1997); *INS v. Yang*, 117 S. Ct. 350 (1996); *General Elec. Co. v. Joiner*, 117 S. Ct. 1243 (1997) (order granting certiorari); *Arkansas Educ. Television Comm'n v. Forbes*, 117 S. Ct. 1243 (1997) (same).

to give the exceptionally important questions presented the benefit of plenary review.¹⁰

* * * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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¹⁰ Respondents' reliance on the 1987 amendments to ANCSA (Opp. 25-27), is entirely misplaced. Respondents quote the amendments for the propositions that "'[n]o provision of this Act shall * * * deny to, any Native organization any degree of sovereign governmental authority over lands * * * or persons in Alaska,'" and that "'[n]o provision * * * shall be construed to invalidate * * * any assertion that Indian country * * * exists or does not exist [in Alaska].'" Opp. 25 (ellipses and emphases in opposition). Tellingly, in the first quotation respondents have deleted the phrase "confer on, or" just prior to "deny to," while in the second they not only delete the critical words "validate or" just prior to "invalidate," they neglect even to denote the omission with ellipses. Pub. L. No. 100-241, §§ 2(8)(B), 17(a), 43 U.S.C. § 1601 note. *See Scott v. Village of Kewaskum*, 786 F.2d 338, 342 (7th Cir. 1986) ("Counsel should not use omissions in an effort to prove a point—it won't work, and it will make the rest of counsel's presentation incredible"). In addition, "the Act" referred to in the quotation is the 1987 amendments, *not* ANCSA. Whatever the case with the 1987 amendments, ANSCA was hardly "silent and neutral" (Opp. 26) on the question presented. *See* Pet. 19.